United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-7583

United States Court of Appeals
FOR THE SECOND CIRCUIT

B
P/S

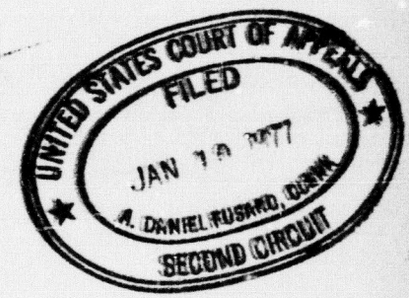
V/O EXPORTKHLEB,

Plaintiff-Appellant,

against

TEXAS TRANSPORT & TERMINAL CO., INC., M/V CONSTANTIA and CHRISTIAN F. AHRENKIEL,

Defendants-Appellees.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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BRIEF OF PLAINTIFF-APPELLANT V/O EXPORTKHLEB

STATEMENT OF FACTS

This action involves a shipment of corn in bulk damaged while in transit from Philadelphia to Nakhoda, Russia aboard the M/V CONSTANTIA in July of 1973. Suit was

instituted by V/O Exportkleb as consignee of the corn, and by Continental Grain Export Corporation as shipper of the grain, against Amtorg Trading Corporation and Texas Transport & Terminal Co., Inc. by filing of a summons and complaint on January 17, 1975. Later that very same day, an amended summons and complaint was filed adding the M/V CONSTANTIA and Christian F. Ahrenkiel as defendants, thereby correcting the earlier inadvertent omission. Thereafter, all parties were served either by the Marshal or one appointed process server by order of the Clerk of the Southern District. Subsequently, Continental Grain Export Corporation and Amtorg Trading Corporation were dropped as parties to this action.

Upon receipt of the damaged corn, plaintiff, V/O Exportkhleb apprised its underwriter's representatives, R. F. Randall, Ltd., of the loss, received payment and thereafter authorized it to commence an action on its behalf to effect a recovery for the damage it sustained. As the Carriage of Goods by Sea Act, 46 U.S.C. §1300, et seq. provides that all suits must be commenced within one year from the date when goods should have been delivered underwriters sought an extension of time for suit from the vessel owner's agents by letter dated June 11, 1974, (A21) mindful that suit time would expire July 16, 1974.

As the owners are a foreign corporation, underwriters naturally wrote to their local agents for extensions of time on behalf of their principals, the vessel owner Ahrenkiel.

Underwriters looked to TTT because TTT appeared to have authority to grant extensions of time. TTT had authority to sign bills of lading on behalf of its master as evidenced by the master's letter to TTT of June 1, 1973, (A20) which stated TTT may "sign any and all documents regarding the cargo of grain laden on board my vessel during my recent call to this port." TTT never denied its authority to grant extensions of time for suit and in fact did grant two extensions in response to letters from underwriter's representatives dated June 11, 1974 (A21) and October 16, 1974, (A23) by signing their approval at the bottom of both letters.

In addition to confirming the extension request dated October 16, 1974, (A23) TTT also sent a copy of such agreement to Lamorte, Burns & Co., Inc., in the belief that Lamorte, Burns & Co., Inc. were agents for the underwriters of the vessel. In fact, even Lamorte, Burns & Co., Inc. were of the impression that they represented the vessel. In a letter to R. F. Randall, Ltd., dated October 4, 1974, Lamorte, Burns & Co., Inc., stated: "The papers in connection with the above claim have been referred to this office for attention since we represent the P & I underwriters of this vessel."(A22).

It was not until three months later that Lamorte, Burns & Co., Inc. first informed R. F. Randall, Ltd., by letter dated January 9, 1975, that neither it nor TTT represented the owner or Sovfracht, a Russian shipping concern which sub-chartered the vessel; and, "[t]herefore, neither we,

nor Texas Transport, can grant further extensions on their behalf."(A24).

At this confusing juncture, Richard F. Randall, Ltd., turned the matter over to counsel to institute suit prior to the expiration of the second extension of time for suit, to January 19, 1975.(A23). It is this dispute as to whether TTT acted as agents for owners which is the basis for this motion to dismiss brought on by defendants, TTT and Ahrenkiel.

Plaintiff contends that TTT acted as agent for an undisclosed principal who later, upon learning of its agent's action on its behalf, failed to repudiate same and thereby became bound by such acts, together with its misrepresenting agent.

POINT I

FAILURE TO OBTAIN LEAVE OF THIS COURT TO AMEND THE COMPLAINT TO ADD DEFENDANTS AHRENKIEL AND M/V CONSTANTIA WAS A MERE TECHNICAL ERROR.

Defendant, Ahrenkiel, correctly points out in its Memorandum in Support of Motion to Dismiss that the addition of parties is governed by Rule 21 of the Federal Rulesof Civil Procedure rather than by Rule 15. However, holdings to the effect that the specific provisions of Rule 21 govern over the general provisions of Rule 15 have been criticized as overly restrictive and violative of the intent and spirit of Rule 15. Kaminsky v. Abrams, 41 F.R.D.

168, 10 F.R. Serv. 2d 15a 32, Case 2 (S.D.N.Y. 1966).

In Kaminsky, Judge Tenney quoted with approval the following passage from 1A, Barron & Holtzoff, Federal Practice & Procedure §443 (Supp. 1965):

> [t]he whole notion of allowing amendments as of course is that at such an early stage in the case the court should not be bothered with passing on amendments and the other party will not be harmed by a change in the pleadings. These considerations seem as applicable to a change in parties as to any other changes made by an amended pleading.

Judge Tenney further observed that "the amendment to Rule 15(c) refers to the relation back of '[a]n amendment changing the party against whom a claim is asserted' inferring that such a change could be effected under 15(a)."

In keeping with the spirit of Rule 15, and in the belief that such rule was applicable, plaintiff amended its complaint by adding defendants Ahrenkiel and M/V CONSTANTIA on the same day, only several hours after the original complaint was filed. Clearly before defendants had even contemplated their answer or been prejudiced in any manner. To hold that this technical error prevents plaintiffs from joining defendants Ahrenkiel and M/V CONSTANTIA in this action would work a great injustice and do violence to the intent of Rule 21, "adopted to obviate the harsh common law adherence to the technical rules of joinder,...and not to deal with the problem of defective federal jurisdiction." Kerr v. Compagnie De Ultramar & Transmar Corp., 250 F.2d 860, 864 (2d Cir. [N.Y.] 1958).

POINT II

WHETHER OR NOT TEXAS TRANSPORT & TERMINAL CO., INC. (TTT) IS LIABLE AS A PRINCIPAL CANNOT BE DETERMINED BY MOTION

Where a foreign vessel's local representatives sign bills of lading on behalf of the master of the vessel, the question of their liability as a principal cannot be decided on motion but must await full development of the facts at trial. International Paper Sales Co., Inc. et al. v. Fundy Shipping Ltd. et al., 1970 A.M.C. 1358 (Exchequer [Canada] 1970) (not cited elsewhere).

Like the defendant in Fundy Shipping, TTT signed the bills of lading on behalf of the master pursuant to a letter of authorization from the master.(A20). This fact is undisputed and so acknowledged by Judge Haight in his Memorandum and Order.(A37). TTT granted extensions of time for suit without disclosing its principal. It may also have engaged in other activities which would render it liable as a principal; however, further discovery and investigation of the facts would be necessary before this can be ascertained. It is precisely for this reason that determination of whether TTT is liable to plaintiffs as a principal must await trial and cannot in all fairness be properly decided at this point in time.

POINT III

TTT, ACTING FOR AN UNDISCLOSED PRINCIPAL, LULLED PLAINTIFF INTO A FALSE SENSE OF SECURITY THROUGH ITS MISREPRESENTATIONS.

On two separate occasions occurring more than three months apart, TTT, by a simple signature, consented to extensions of time phrased: "We would ask YOU to confirm extension of time in which suit may be brought..."(emphasis added). (A21,23). TTT did not sign as agent, let alone as agent for a specified principal. By failing to properly indicate the capacity in which it agreed to these extensions, it acted at its peril. It is an ancient principle of law and equity that "he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." Dickerson v. Colgrave, 100 U.S. 578, 580, 25 L.Ed. 618 (1879).

By undertaking to grant extensions of time to cargo interests without specifying the limitation of its authority or its inability to bind the owners, Ahrenkiel, it lulled plaintiff into postponing suit beyond the statutory period. Clearly TTT knew that plaintiff's agents were of the impression that it was authorizing extensions of time on behalf of owners as well, perhaps, as charterers. In fact, even TTT believed it acted for owners at the time extensions were granted; Mr. Sweet's self-serving affidavit, after the fact, to the contrary not withstanding.(A4). Otherwise, no purpose would be served in advising Lamorte, Burns & Co., Inc. of the first extension AFTER it was given. Propriety and fairness would dictate that TTT advise plaintiff's agent that it look to owner's agents for an extension of time BEFORE it granted its

own extension. Commonly, a charterer will grant an extension of time for suit only on condition that a similar extension is obtained from owners, so as to protect itself from increased liability resulting from the absence of the owner as a viable defendant.

The law is settled that

> where an agent is guilty of misfeasance; that is, where he has actually entered upon the performance of his duties to his principal and in doing so, fails to respect the rights of others, by doing some wrong, whether it is a wrong of omission or a wrong of commission, as where he fails or neglects to use reasonable care and diligence in the performance of his duties, he will be personally responsible to a third person who is injured by reason of such misfeasance. This case has been followed uniformly as a correct statement of the rule in such cases.

Case v. Missouri Public Service Corp. et al., 78 F.Supp. 776, 778 (W.D. Mo. 1948). See First Nat'l Bank of Portland v. Dudley, 231 F.2d 396, 401 (9th Cir. [Ore.] 1956), 3 Pomeroy, Equity Jurisprudence 189-192 §§804-805 (5th Ed. 1941).

It should be noted that even if cargo interests knew defendant TTT to be acting as an agent, no evidence has been offered to indicate disclosure of the principle. "Where a principal's identity is concealed the agent may be held personally liable. Ell Dee Clothing v. Marsh, 247 N.Y. 392, 397,160 N.E. 651,653; Scire v. American Export Lines, 197

Misc. 422, 93 N.Y.S. 2d 457." Stockholm v. All Transport, 1 Misc. 2d 949, 154 N.Y.S. 2d 572,573 (1956); Horan v. Hughes, 129 F. 248 (S.D.N.Y. 1903), aff'd. 129 F. 1005 (2d Cir. [N.Y.] 1904). "It is not sufficient to relieve the agent from personal liability that the person with whom he dealt had means of knowing that the agent was acting as such." 1 Williston, Contracts (Rev. Ed. §288).

In its Memorandum of Law defendant Ahrenkiel suggests, without the benefit of supporting legal authority, that by virtue of underwriter's status as subrogee it stands in the shoes of the subrogor and thus is deemed to know all that which the parties to the transaction knew. He then concludes without evidentiary support, that all parties to the transaction knew that TTT acted as agent for Sovfracht. It is in fact not true that the consignee from whom underwriter derived its rights knew TTT to be acting as agent for Sovfracht. Therefore, if anything is to be imputed to underwriters, it is the absence of knowledge by consignee, Exportkhleb of the relationship between TTT and Sovfracht.

In the interest of common honesty, ordinary fairness, and good conscience, the basic precepts for which equitable estoppel stands, TTT may not simply walk away from this suit by asserting that it acted merely as an agent and that this action is time barred. The fact is that if TTT had remained silent, suit would have been commenced timely. Equity looks "to the substance and not merely to the form." Young v. Higbee Co.,

324 U.S. 204,209, 65 S.Ct. 594, 89 L.Ed. 890 (1945).

POINT IV

DEFENDANT AHRENKIEL'S FAILURE TO PROMPTLY REPUDIATE THE ACTS OF TTT CONSTITUTES RATIFICATION OF THOSE ACTS AND PRECLUDES IT FROM DENYING THEIR PRINCIPAL-AGENT RELATIONSHIP

The master of the M/V CONSTANTIA, as agent for the owner of the vessel authorized TTT by letter dated June 1, 1973, "to sign any and all documents regarding the cargo of grain laden onboard my vessel during my recent call to port."(A20). As a minimum, then, TTT acted as agent for owners, Ahrenkiel, for the purpose of signing bills of lading. This fact is recognized by Judge Haight, and he states "the parties appear to agree that on the voyage in suit TTT signed the bills of lading on behalf of the master."(A37).

Judge Haight's next statement, however, is not necessarily supported by the facts. He states that "there is no evidence that TTT signed any other document or took any other action on behalf of the master, vessel or shipowner."(A37). Plaintiff concedes that the evidence at hand at this early stage in the proceedings is indeed sparse. It is however sufficient to raise doubts as to whether TTT only signed bills of lading on behalf of owners.

"Apparent authority is created in an agent when the principal, by written or spoken words or any other conduct causes third parties to reasonably believe that the principal consents to have the act done or the words spoken on his behalf

by the person purporting to act for him. Brownell v. Tidewater Assoc. Oil Co., 121 F.2d 239 (1st Cir. [N.H.] 1941)." Kristiansand v. United States, 385 F.2d 301 (5th Cir. [Tex.] 1964).

The precise time when Ahrenkiel was informed of TTT's extensions is uncertain. However, it certainly was aware that TTT had purported to grant an extension of time for suit on its behalf before January 9, 1975 the date on which Lamorte, Burns & Co., Inc. informed plaintiffs that both prior extensions by TTT on behalf of Ahrenkiel were invalid.(A24). In light of the drastic results which must necessarily flow from an agent's inducing a third party to delay suit beyond the limitation period, the principal for whom such agent purports to act is obliged, eo instanti, to repudiate such acts. Where an agent has exceeded his authority, an intention to ratify will be presumed from the silence of the principal who has received a letter informing him what has been done on his account. Feild v. Farrington, 77 U.S. [10 Wall.] 141,19 L.Ed. 923 (1869). At some point either before or after time for suit had run, Ahrenkiel was made aware either by telex or letter, sent either by TTT or Lamorte, Burns & Co., Inc., that TTT purported to grant extensions of time on its behalf. At this point it was incumbent upon Ahrenkiel to telex plaintiff that it was not bound by the acts of TTT. Failing to promptly repudiate TTT's actions, it must be deemed to have ratified same and became bound by the extensions, nunc pro tunc.

> A principle can adopt and ratify an unauthorized act of his agent who in fact is assuming to act in his behalf, although not disclosing

> his agency to others, and when it is so ratified it is as if the principal had given an original authority to that effect and the ratification relates back to the time of the act which is ratified.

Clews v. Jamieson, 182 U.S. 461,483, 21 S.Ct. 845, 45 L.Ed. 1183 (1901).

While the general rule is that a principal must disavow the acts of his agent within a reasonable time, under certain circumstances disavowal must be prompt to avoid injury to third parties, and therefore if disavowal is not prompt, it is not reasonable. Id See, 3 Am Jur. 2d Agency §179 (1962).

Defendants contend that this is not a case of an agent acting in excess of its authority, but one in which no agency was ever created, so that Ahrenkiel never had any obligation to repudiate TTT's acts. In support of this proposition they submit a wholly self-serving affidavit by Mr. David Sweet made after this action was commenced and solely for the purpose of bolstering their contentions of lack of agency.(A4). Upon reading this affidavit and the Memoranda of Law, one is hard put to determine which served as the outline for the other, so neatly do they fit together. Such support as an evidentiary matter is no support at all.

Accordingly, it must be concluded that TTT was an agent of Ahrenkiel not merely for the limited purpose of signing bills of lading, but for far more extensive and general purposes. Thus plaintiff properly relied on TTT's apparent authority to bind Ahrenkiel with respect to extensions of

time and with respect to its authority to accept service of process on behalf of Arhenkiel.

POINT V

WHETHER DEFENDANTS ARE ESTOPPED FROM ASSERTING THE DEFENSE OF TIME BAR MUST BE DETERMINED AFTER A FULL TRIAL ON THE FACTS.

The instant motion to dismiss is in effect a motion for summary judgment since plaintiff will be out of court if defendants' prevail on appeal. Accordingly, this court must act with caution in terminating this action at so early a stage and before parties have had an opportunity to develop all the pertinent facts.

It is black letter law that a defendant may not rely on a statute of limitations defense when such a defense in light of defendant's conduct, would be inequitable. Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed. 2d 770 (1959). In the words of Justice Black:

> To decide the case we need look no further than the maxim that no man may take advantage of his wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statute of limitations. (Citations omitted.) 79 S.Ct. at 762.

Judge Edelstein was confronted with a similar situation in Austin, Nichols & Co., Inc. v. Cunard Steamship Ltd.,

367 F.Supp. 947 (S.DN.Y. 1973). There a motion for summary judgment was before the court on the ground that the suit was time barred because it had not been commenced within one year after the goods were to have been delivered as required by the Carriage of Goods by Sea Act, 46 U.S.C. §1300 et seq. In affirming a previous denial of the motion for summary judgment, the court held estoppel a valid defense to defendant's claim of time bar, and that there was a genuine issue of fact as to the existence of estoppel. See The Argentina, 28 F.Supp. 440 (S.D.N.Y. 1939), wherein "the policy of justice and equity which is supposed to find expression in every judicial decision," compelled the court to reserve for trial the issue of whether the facts of the case constituted an estoppel in avoidance of the time limitation clause; United Fruit Co. v. J.A. Folger & Co., 270 F.2d 666 (5th Cir. [La.] 1959); Michelena & Co. v. American Export and Isbrandtsen Lines, Inc., 258 F.Supp. 479 (D.P.R. 1966).

The motion to dismiss should be denied in the interests of justice. Although there appears to be a paucity of factual data and a more thorough investigation, by way of discovery, of the relationship between the parties is warranted under the circumstances prior to a determination of the issues at hand, nonetheless, should the court feel a decision on the merits of these arguments is appropriate at this time, defendants' motion to dismiss must be denied. Defendants have failed to negate the agency relationship established by plaintiff and relied upon by plaintiff to its detriment. With respect

to the time bar assertion, the crux of this case, defendants are estopped by their conduct from asserting same. As stated heretofore, plaintiffs were wrongly lulled into a false sense of security by defendants. Defendants cannot now take advantage of their own misrepresentations to avoid liability to plaintiff.

It is respectfully submitted that defendant's motion to dismiss granted by the District Court for the Southern District of New York be reversed.

CONCLUSION

The judgment of the lower Court should be reversed and plaintiff's complaint reinstated as to both defendants.

Respectfully submitted,

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Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 10TH day of JANUARY 1977

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Attorneys for APPELLEE TEXAS TRANSPORT

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Wilson, Engler, Jones & Houston

ATTORNEYS FOR APPELLEE AHRENKIEL

CICHANOWICZ & CALLAN

by Michael J. Callan

JAN 10 1977

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